

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TIFFANY NICOLE BURNEY,

Defendant and Appellant.

D072150

(Super. Ct. No. SCD238174)

APPEAL from a judgment of the Superior Court of San Diego County, Eugenia A. Eyherabide, Judge. Affirmed and remanded with directions.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Alana C. Butler, Deputy Attorneys General, for Plaintiff and Respondent.

Tiffany Nicole Burney was charged with murder after shooting her great-aunt, Daisy H., in the face four times. She pleaded not guilty and not guilty by reason of insanity. At the guilt phase of trial, a jury found Burney guilty of first degree murder (Pen. Code,¹ § 187, subd. (a)) and found true the allegation that she personally used a firearm (§ 12022.53, subd. (d)). The court declared a mistrial at the sanity phase after the jury was unable to reach a verdict. At the second sanity trial, the jury heard conflicting testimony regarding Burney's sanity at the time of the shooting. The jury found Burney sane, and the trial court sentenced her to 50 years to life in prison.

Burney appeals, arguing that no rational juror could have disregarded the compelling evidence of her insanity. We conclude that substantial evidence supports the jury's finding. Burney also argues that the matter must be remanded to the trial court so it may exercise its discretion in determining whether to strike the firearm enhancement. We agree and remand for this limited purpose. Burney subsequently filed a supplemental brief requesting that her case be remanded to allow the trial court to consider whether to grant her mental health diversion under section 1001.36. We conclude that, on this record, remand is unwarranted because no trial court would grant Burney mental health diversion because she poses an unreasonable risk of danger to public safety.

FACTUAL BACKGROUND

Following the well-established rule of appellate review, we recite the facts in the light most favorable to the judgment. (*People v. Bogle* (1995) 41 Cal.App.4th 770, 775.) Because Burney pleaded not guilty and not guilty by reason of insanity, trial was

¹ Undesignated statutory references are to the Penal Code.

bifurcated into guilt and sanity phases. (§ 1026; *People v. Elmore* (2014) 59 Cal.4th 121, 140-141 (*Elmore*).) Burney's primary claim on appeal relates solely to the sanity phase. We therefore base our factual recitation on the evidence adduced during the sanity phase of the trial. Additionally, because it was undisputed that Burney suffered from a severe mental illness at the time of the shooting, we provide an abbreviated account of her mental health history to provide context for our later discussion.

Burney's Mental Health History

Burney's mother had her hospitalized at age 13 because of auditory hallucinations. Burney was diagnosed with obsessive compulsive disorder, but reported hearing voices in her head. From age 18, Burney was intermittently homeless because of her behavior while staying with family members. In 2010, when Burney was 22-years-old, she sought treatment for depression, mood swings, and auditory hallucinations. Less than a week later she was involuntarily hospitalized for six weeks after threatening to commit suicide and kill other people. She was diagnosed with paranoid schizophrenia and released to an outpatient treatment facility, but she declined further treatment.

In December 2010 Burney's mother brought her to Aurora Behavioral Health (Aurora), a psychiatric hospital, because Burney had not been sleeping. At this time Burney was placed on permanent conservatorship. She remained at Aurora for two months and was then transferred to the Alpine Specialty Treatment Center (Alpine), a long-term, locked psychiatric facility. She remained there for seven months and was

released in September 2011² to a board and care facility. In October Burney attempted to purchase a handgun. After the Department of Justice denied her application, Burney attempted to bribe a gun shop employee to sell her the gun.

Tricia T. worked as Burney's case manager during Burney's conservatorship. She first met with Burney in October at the board and care facility and again in November after Burney had moved in with her mother and sister. In early November Burney displayed labile moods, reported difficulty sleeping and complained that her medications made her "foggy." Tricia visited Burney again in late November and noted that Burney appeared worse and was unwilling to take her medications or go to a hospital.

During another visit on December 12, just two days before the murder, Burney appeared "a lot worse," but denied having any suicidal or homicidal ideation. Burney was not willing to see a doctor and Tricia concluded that Burney did not qualify for involuntary hospitalization. At around this time, Burney told her cousin that her family did not love her. A week before the killing, she complained to her great-uncle that "nobody liked her."

Daisy's Murder and Burney's Confession

On December 13 Daisy took her husband to the hospital and then returned home. The following morning, the husband asked his daughter to check on Daisy because he could not contact her by telephone. The daughter found Daisy's body in the living room. Daisy died from four gunshot wounds to her face. Bullets recovered from the scene revealed that she was killed with a .38-caliber revolver.

² Undesignated date references are to 2011.

On December 15 Burney went to the hospital complaining of racing thoughts. She was held for an evaluation and later transferred to a psychiatric hospital. On December 17 Burney called 911 and stated that she had shot Daisy in her home. Burney explained that the gun she used was in her van, which was parked near the hospital. Police located the van and found a .38-caliber revolver inside. Ballistics testing revealed that the gun was the murder weapon.

The hospital released Burney and police drove her to police headquarters. The police audio recorded the car ride. Police later videotaped their interview of Burney. Burney initially told detectives that she went to Daisy's home at 3:00 a.m. to use the bathroom. She saw a red car with a person seated inside parked outside of Daisy's house. She went in, used the restroom, chatted with Daisy and then left. After Burney denied shooting Daisy, the detectives played Burney's 911 call.

Burney claimed that the voice on the recording was not hers, but then admitted that she bought a .38-caliber revolver from someone downtown for \$200. Burney claimed that she bought the gun to kill herself, but could not do it. She then wanted to kill other people because they were "pissing [her] off." She decided to kill Daisy, claiming it was the "stupidest" thing she could have done. Burney stated that she shot Daisy about four times, but thought that Daisy was "okay" because "[s]he's so strong. She moved."

Burney told the detectives, "Now that the shit hits the fan and I'm scared. That's my fucking auntie. What the fuck am I gonna say? Plead insanity and fucking go to the mental hospital for the rest of my life. No." On the way to jail after being interviewed,

Burney stated that "she really had messed up and she couldn't believe she did this to her family."

DISCUSSION

I. *SUBSTANTIAL EVIDENCE SUPPORTS THE SANITY VERDICT*

A. *General Legal Principles*

During the guilt phase of trial, the defendant is conclusively presumed to have been legally sane at the time of the offense. (§ 1026, subd. (a); *Elmore, supra*, 59 Cal.4th at p. 141.) If the defendant is found guilty, the trial proceeds to the sanity phase, in which the defendant has the burden to prove "by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (§ 25, subd. (b).) Although the statute uses the conjunctive "and," our Supreme Court has interpreted this statutory language to mean that insanity can be shown under either the "nature and quality" prong or the "right from wrong" prong of the test. (*People v. Skinner* (1985) 39 Cal.3d 765, 775-779; *People v. Powell* (2018) 5 Cal.5th 921 (*Powell*).) In other words, "a defendant who is incapable of understanding that his [or her] act is morally wrong is not criminally liable merely because he [or she] knows the act is unlawful." (*Skinner*, at p. 783.) "A defendant 'may suffer from a diagnosable mental illness without being legally insane.' " (*Powell*, at p. 955.)

In *Powell, supra*, 5 Cal.5th 921, our high court clarified the standard of review for a sanity determination. In that case, the defendant argued "that the jury's sanity determination must be reversed because the expert evidence he presented 'was of such

weight and quality that a jury could not reasonably reject it.' " (*Id.* at p. 956.) The court stated that this argument "is based on a misreading of *People v. Drew* (1978) 22 Cal.3d 333 (*Drew*)." (*Powell*, at p. 956.) In *Drew*, the only evidence introduced at the sanity phase of trial was the testimony of two court-appointed psychiatrists, "both of whom opined that defendant was insane." (*Powell*, at p. 956.) In this context, where no affirmative evidence of sanity had been presented, the court held, " 'the question on appeal is not so much the substantiality of the evidence favoring the jury's finding as whether the evidence contrary to that finding [i.e., the unanimous expert opinions] is of such weight and character that the jury could not reasonably reject it.' [Citation.] For reasons the decision explained, the value of both experts' evaluations could be questioned, permitting the jury to reasonably reject both." (*Ibid.*)

Where, however, the evidence consists of expert witnesses for each side, the *Powell* court explained that "the most common formulation of the substantial evidence test [applies], in which the appellate court reviews the entire record in the light most favorable to the jury's determination and affirms that determination if it is supported by evidence that is 'reasonable, credible and of solid value.' [Citation.] This is the standard of review applied to a jury finding of competency to stand trial, an analogous inquiry in which the defendant bears the burden of proof by a preponderance of the evidence. [Citations.] We therefore hold that a jury's finding of sanity will be affirmed if it is supported by evidence that is reasonable, credible, and of solid value, from which a

reasonable trier of fact could find the defendant sane by a preponderance of the evidence." (*Powell*, *supra*, 5 Cal.5th at p. 957.)³

B. Analysis

Citing *Drew*, *supra*, 22 Cal.3d 333, Burney contends that "the question [on appeal] is not whether substantial evidence supports the sanity finding, but whether the evidence contrary to that finding is of such weight and character that the jury could not reasonably reject it." She argues that the sanity finding violates due process and should be reversed because no rational trier of fact could have disregarded the compelling evidence that she was legally insane at the time she committed the offense.

As the *Powell* court explained, where, as here, there is conflicting evidence on the sanity issue, the common formulation of the substantial evidence test applies. (*Powell*, *supra*, 5 Cal.5th at p. 957.) Under this standard we will affirm the jury's sanity finding if it is supported by "evidence that is reasonable, credible, and of solid value, from which a reasonable trier of fact could find [Burney] sane by a preponderance of the evidence." (*Ibid.*) Here, the record contains evidence from which the jury could conclude that Burney knew the nature and quality of her acts and that her actions were both legally and morally wrong.

At the second sanity phase trial, two defense experts (Drs. Clipson and Abrams) and a court-appointed expert (Dr. Takamura) testified regarding Burney's sanity when she killed Daisy. All three doctors agreed that Burney suffered from schizoaffective disorder,

³ Because the Supreme Court decided *Powell*, *supra*, 5 Cal.5th 921 after the completion of briefing, we requested and have reviewed supplemental briefs on this issue.

a severe mental illness, when she killed Daisy. Dr. Clipson testified that Burney knew the nature and quality of her acts. Dr. Abrams not address this standard. Dr. Takamura did not expressly testify whether Burney knew the nature and quality of her acts, but rather stated that this standard was "pretty easy" to meet. Drs. Clipson and Tamamura agreed that Burney knew that her actions were legally wrong. Accordingly, this case turns on whether Burney understood the moral wrongfulness of her actions. The doctors' opinions diverged on this issue.

Dr. Clipson testified that at the time of the killing Burney's psychosis drove her actions and that she was incapable of distinguishing right from wrong from a moral standpoint. In his opinion, Burney killed Daisy because she heard Daisy's voice in her head along with some other people's voices, that Daisy's voice was torturing her, and that she killed Daisy to stop the voice and get relief from the voice.

Dr. Abrams concluded that Burney's severe mental illness made her unable to distinguish right from wrong. He inferred from the records that Burney believed that Daisy was the source of the voices in her head, "that she thought her great aunt was somehow making her go crazy and that she felt the only way not to kill herself and not to go crazy was to kill" Daisy.

Dr. Takamura—the court appointed psychiatrist—disagreed with the defense doctors on this issue. He opined that Burney knew the difference between right and wrong from both a legal and a moral standpoint when she committed the offense. Dr. Takamura based his opinion on the records and his interview with Burney. He noted that a few days before the killing Burney's county case worker did not believe that Burney

needed to be hospitalized. Dr. Takamura considered it important that Burney went to her mother's house after the killing and apologized. Dr. Takamura noted that "you don't usually say sorry if you don't think you are guilty or wrong about something." Additionally, after the killing the hospital discharged Burney before the involuntary 72-hour observation period expired. Dr. Takamura believed that Burney's comments to detectives indicated that she knew the difference between right and wrong, citing Burney's statements that she would bring Daisy back if she could, that she wished it was her as opposed to Daisy, and that she left the scene thinking Daisy would call 911 and be okay.

Dr. Takamura determined "that there wasn't strong enough evidence of a persistent delusional thought that could account for [Burney's] killing aunt Daisy." Dr. Takamura noted that before the murder Burney's records did not show any delusions centered around Daisy and that at the time of her arrest Burney made no statements to police to corroborate evidence of a delusion to explain her actions such as telling police, "I had to do it, it was either my sanity, my intelligence, or her, and so I had to do it, I had no choice" During his interview with Burney Dr. Tamamura "really fished" to see evidence that Burney struggled with the moral wrongfulness of her actions. Dr. Takamura stated:

"[T]he best that I could ascertain was she was upset that people were happy, around her family; she was upset that aunt Daisy had not signed her out of the hospital from Aurora because she stayed there two months, and then went to an extended hospital stay at Alpine. And that was the main crux of what I could gather, which really isn't much of a delusion. So that's why my ultimate opinion is that she did know the difference between right and wrong on a moral basis as well."

Here, while the three experts agreed that Burney suffered from a severe mental illness, that fact does not inevitably mean Burney was legally insane when she killed Daisy. (*Powell, supra*, 5 Cal.5th at p. 955.) On this issue, Dr. Takamura disagreed with Drs. Clipson and Abrams. "It was for the jury to evaluate the testimony of the experts, examine the bases for their opinions and determine whom to believe." (*People v. Chavez* (2008) 160 Cal.App.4th 882, 891.) As our high court recently noted, "The issue of legal sanity is . . . a complex and uncertain one about which fully competent experts can reasonably disagree." (*Powell*, at p. 958.) After evaluating the evidence, the jury concluded that Burney was sane at the time of the charged offense. There is no basis for us to disturb the jury's conclusion.

II. FIREARM ENHANCEMENT

The jury found true the allegation that Burney had personally used a firearm within the meaning of section 12022.53, subdivision (d) when committing the murder. The trial court imposed a term of 25 years to life on the murder charge and an additional consecutive 25-year-to-life term on the gun allegation under section 12022.53, for a total term of 50 years to life.

Prior to January 1, 2018, an enhancement under section 12022.53 was mandatory; it could not be stricken in the interests of justice. (See former § 12022.53, subd. (h), Stats. 2010, ch. 711, § 4; *People v. Felix* (2002) 108 Cal.App.4th 994, 999.) Effective January 1, 2018, the Legislature amended section 12022.53 (Stats. 2017, ch. 682, § 2) to provide that the "court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by

this section." (See, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363, citing former § 12022.53, subd. (h).)

Burney contends that remand is necessary to give the trial court an opportunity to exercise its discretion on whether to strike the firearm enhancement. The People concede that amended section 12022.53 applies retroactively and gives a trial court the discretion to strike a previously mandatory firearm enhancement. We agree.

Although amendments to the Penal Code generally do not apply retroactively (§ 3), our Supreme Court has recognized an exception for an amendment that reduces the punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*).) The Supreme Court has extended the *Estrada* holding to amendments that give the trial court discretion to impose a lesser sentence even if it does not necessarily reduce a defendant's punishment. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76.) Accordingly, the amendment applies retroactively to persons, like Burney, whose convictions are not yet final on appeal. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) A remand for resentencing is appropriate because the record does not indicate how the trial court would have exercised its discretion had it known it could. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 713.)

III. MENTAL HEALTH DIVERSION

A. Legislation Background

Effective June 27, 2018, the Legislature created a new pretrial diversion program for defendants suffering from a qualifying mental disorder. (§ 1001.36, subds. (a) & (b)(1).) One of the purposes of the legislation was to promote "[i]ncreased diversion of

individuals with mental disorders . . . while protecting public safety." (§ 1001.35, subd. (a).) " '[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication" (§ 1001.36, subd. (c).) A trial court may grant pretrial diversion if all the following eligibility criteria are satisfied: (1) a qualified mental health expert has recently diagnosed the defendant with a qualifying mental disorder; (2) the "mental disorder played a significant role in the commission of the charged offense"; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (§ 1001.36, subd. (b)(1)(A)-(F).)

On September 30, 2018, the Legislature amended section 1001.36, effective January 1, 2019, to eliminate a defendant's eligibility for diversion if the defendant is charged with certain offenses, including murder.⁴ (§ 1001.36, subd. (b)(2).)

B. *Analysis*

Citing *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*),⁵ Burney argues that section 1001.36 applies retroactively and we must remand the matter to the trial court for a mental health diversion eligibility hearing. She contends that amended section 1001.36,

⁴ We refer to section 1001.36 as originally enacted as "section 1001.36" and section 1001.36 as amended effective January 1, 2019 as "amended section 1001.36."

⁵ *Frahs*, *supra*, 27 Cal.App.5th 784, review granted December 27, 2018, S252220.

which precludes defendants charged with murder from being eligible for diversion, should only apply prospectively.

The Attorney General asserts that section 1001.36 is not retroactive, that *Frahs, supra*, 27 Cal.App.5th 784 was wrongly decided, and under amended section 1001.36 Burney's murder conviction renders her ineligible for diversion. Even assuming section 1001.36 is retroactive and amended section 1001.36 applies prospectively, the People contend that remand would be futile because the trial court would inevitably find that Burney poses an unreasonable risk of danger to public safety. We agree with this latter contention.

Generally, amendments to the Penal Code are presumed to apply prospectively unless they state otherwise. (See § 3.) Nonetheless, the presumption against retroactivity does not apply when the Legislature reduces the punishment for criminal conduct. (*Estrada, supra*, 63 Cal.2d at pp. 744-745.) In *Frahs, supra*, 27 Cal.App.5th 784, our colleagues in Division Three determined that section 1001.36 applies retroactively because "the Legislature 'must have intended' that the potential 'ameliorating benefits' of mental health diversion to 'apply to every case to which it constitutionally could apply.' " (*Frahs, supra*, 27 Cal.App.5th at p. 791.)

For purposes of analysis, we will assume without deciding that section 1001.36 applies retroactively. We will also assume without deciding that amended section 1001.36 applies prospectively and that Burney's murder conviction does not render her ineligible for diversion. (See § 3.) Based on the record before us, we are convinced that

the trial court would not grant Burney mental health diversion because she poses an unreasonable risk of danger to public safety.

Among other criteria that must be met before a trial court may grant mental health diversion, the statute requires that the court be "satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, *if treated in the community*." ⁶ (§ 1001.36, subd. (b)(1)(F), italics added.) In making this determination, a court "may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate." (*Ibid.*)

Here, Burney has suffered from serious mental health issues since age 13 despite almost continuous treatment in the community and the support of her family. (See, *ante*, Factual Background.) Burney told the police that she wanted to kill other people because they were "pissing [her] off." Despite her loving relationship with Daisy, she decided to kill Daisy and shot Daisy four times in the face. Given Burney's mental health and treatment history, and the nature of Burney's offense, we are convinced that the trial court would not find Burney eligible for mental health diversion under section 1001.36. On this record, remanding the matter to the trial court would be an idle act. (See *People v.*

⁶ Section 1170.18, subdivision (c) provides: "As used throughout this code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." This list of serious or violent felony convictions referred to in section 667 includes, inter alia, "[a]ny homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5." (§ 667, subd. (e)(2)(C)(iv)(IV).)

Coelho (2001) 89 Cal.App.4th 861, 889 ["[R]eviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance because it is not reasonably probable the court would impose a different sentence."].) Accordingly, we decline Burney's request to conditionally reverse the judgment and remand the matter to the trial court for a mental health diversion eligibility hearing.

DISPOSITION

The judgment is affirmed. The sentence is vacated and the matter is remanded for resentencing for the limited purpose of allowing the trial court to consider whether the Penal Code section 12022.53, subdivision (d) enhancement should be stricken or dismissed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.